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No. 84-314

In The

Supreme Court of the United States

October Term, 1984

ANTHONY F. GIGLIO,

Petitioner,

vs.

JOHN P. DUNN, Individually, and as Superintendent of Schools of Mt. Morris Central School District, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Paul R. Braunsdorf,
Counsel of Record
HARRIS, BEACH, WILCOX, RUBIN and LEVEY
Office and Post Office Address
Two State Street
Rochester, New York 14614
Telephone: (716) 232-4440
Counsel for Respondents

James A. Spitz, Jr.
Angela J. Panzarella
Of Counsel

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires the State of New York to provide a hearing prior to an employee's allegedly coerced resignation where the State made available to the employee an adequate postdeprivation procedure for contesting that resignation.

TABLE OF CONTENTS

	Page
Question Presented	*i*
Table of Contents	*iii*
Table of Authorities	*iv*
Statement of the Case	1
REASONS FOR DENYING WRIT	
I. THE DECISION OF THE COURT OF APPEALS WAS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT.	2
II. PETITIONER HAS NOT DEMONSTRATED THAT A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS.	5
III. THERE IS NO INTRACIRCUIT CONFLICT.	7
IV. THIS CASE PRESENTS NO SPECIAL OR IMPORTANT ISSUES REQUIRING THIS COURT'S ATTENTION.	8
Conclusion	9

TABLE OF AUTHORITIES

Cases	Page
Arnett v. Kennedy, 416 U.S. 134 (1974)	6
Burtnieks v. City of New York, 716 F.2d 982 (2d Cir. 1983)	7
Cacchioli v. Hoberman, 31 N.Y.2d 287, 291 N.E.2d 117 (1982)	5
Cohen v. City of Philadelphia, 736 F.2d 81 (3rd Cir. 1984)	5, 6
Giglio v. Dunn, 732 F.2d 1133 (2nd Cir. 1984)	2, 3
Hudson v. Palmer, 52 U.S.L.W. 5052 (U.S. July 3, 1984)	3, 4, 6, 7
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	4
Loudermill v. Cleveland Board of Education, 721 F.2d 550 (6th Cir. 1983) *cert. granted*, 52 U.S.L.W. 3844 (U.S. July 21, 1984) (Nos. 83-1362, 83-6392)	6
Mathews v. Eldridge, 424 U.S. 319 (1976)	6
Parratt v. Taylor, 451 U.S. 527 (1981)	2, 3, 6
Vail v. Board of Education, 706 F.2d 1435 (7th Cir. 1983) *aff'd by equally divided court*, 52 U.S.L.W. 4483 (U.S. April 23, 1984)	6

Statutes, Rules	Page
42 U.S.C. §1983	1, 2
Fed. R. Civ. P. 12(b)	1
N.Y. Educ. Law §3020-a (McKinney)	4
N.Y.C.P.L.R. Art. 78	4, 7

Miscellaneous Authorities:

Seigel, *New York Practice* §557 *et seq* (1978)	5

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Respondents respectfully request that this Court deny the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

Petitioner commenced this action in United States District Court for the Western District of New York pursuant to 42 U.S.C. §1983. Petitioner alleged in his complaint that he resigned from his position as a tenured high school principal in the Mount Morris Central School District. Petitioner further alleged that his resignation was coerced and claimed that he was denied due process of law because a hearing did not precede the alleged coerced resignation.

On July 13, 1983, the district court granted respondent's motion for an order pursuant to Rule 12(b) or the Federal Rules of Civil Proceeding to dismiss the complaint for failure to state a claim upon which relief can be granted.

The Court of Appeals for the Second Circuit affirmed the decision of the district court. *Giglio v. Dunn*, 732 F.2d 1133 (2d Cir. 1984). Relying on *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court of Appeals held that it would have been impracticable for the State of New York to provide petitioner a meaningful pre-resignation hearing. It further found that the petitioner had available to him adequate postdeprivation procedures under New York law. According, it agreed with the lower court's view that petitioner's complaint failed to state a claim under 42 U.S.C. §1983.

Giglio subsequently petitioned for a rehearing and a rehearing en banc. The petition was denied.

REASONS FOR DENYING WRIT

I. THE DECISION OF THE COURT OF APPEALS WAS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Court of Appeals for the Second Circuit faithfully applied the decisions of this Court in coming to its decision in this case. The Court of Appeals relied for its decision on this Court's holding in *Parratt v. Taylor*, 451 U.S. 527 (1981), in which this Court held that adequate postdeprivation remedies satisfy the requisites of procedural due process where it is impracticable for the State to provide a meaningful predeprivation hearing.

The Court of Appeals properly applied this Court's analysis in *Parratt* and concluded that it was impracticable for the State of New York to provide the petitioner a hearing before he resigned. The court reasoned that the concept of a predeprivation hearing simply has no meaning in the context of an allegedly coerced resignation. As the Court of Appeals pointed out, it is difficult to envision what sort of hearing or process the State of New York could have afforded the petitioner before he resigned or what issues could have been litigated. In a case such as this, where the loss of employment was not a unilateral act on the part of the

employer nor purports to be for cause, "the only possible dispute is whether the resignation was voluntary or involuntary, and this cannot be determined in advance." *Giglio v. Dunn,* 732 F.2d 1133, 1135 (2d Cir. 1984).

This Court's recent decision in *Hudson v. Palmer,* 52 U.S.L.W. 5052 (U.S. July 3, 1984), contrary to petitioner's suggestion, demonstrates that the Court of Appeals' application of *Parratt* to this case was entirely proper. In *Hudson v. Palmer,* this Court extended the holding of *Parratt v. Taylor* to unauthorized, intentional deprivations of property as follows:

> The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur . . . . The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct.

Id. at 5056. The Court of Appeals correctly held that the alleged intentional coercion of petitioner and his subsequent resignation could not have been anticipated and controlled in advance by the State.

Petitioner still argues that a predeprivation hearing was practicable because the respondents' intentionally coercive conduct was predictable by them, and they could have thus afforded the petitioner a hearing before he succumbed and submitted his resignation. This argument was rejected by the Court in *Hudson v. Palmer,* where the Court pointed out that an individual official's ability to foresee and control the deprivation is not relevant to the issue of whether the *State* can provide predeprivation process. 52 U.S.L.W. at 5056. Here, as in *Hudson,* the State is powerless to anticipate when officials will commit random and unauthorized coercive acts and intercede with process. In a case such as this, "the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." *Id.*

Petitioner's contention that the Court of Appeals erred in failing to apply the decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), is also without merit. In *Logan,* this Court held that a postdeprivation state remedy does not satisfy due process where the property deprivation is effected pursuant to an established state procedure. Petitioner's argument that established state procedure was involved in this case is, upon closer examination, simply a variation of the argument rejected in *Hudson v. Palmer,* discussed above.

Pared to its essentials, petitioner's claim is that because the respondents were the "sole state actors" who could provide him a hearing before he resigned, their conduct (or misconduct) constituted established state procedure. Under petitioner's analysis, any property loss resulting from intentional misconduct on the part of a state official would constitute established state procedure because that official would be the sole actor in a position to decide if process will be afforded before the misconduct and resulting loss occurs. This is precisely the argument rejected by the Court in *Hudson v. Palmer, supra.*

Petitioner's argument also overlooks the fact that his property loss occurred when he resigned, allegedly as a result of harassment. As the Court of Appeals pointed out, a resignation, even one that is allegedly involuntary, is fundamentally different from a termination for cause. New York has provided pretermination procedures in the latter situation. See N.Y. Educ. Law §3020-a (McKinney). In contrast, no procedure exists or could exist for intercession by the State before an employee resigns.

As the Court of Appeals determined, the petitioner had available to him a meaningful opportunity to be heard and to redress his claim through a proceeding pursuant to Article 78 of the New

York Civil Practice Law and Rules.[1] Had petitioner availed himself of this procedure, he could have contested the voluntariness of his resignation and, if successful, been awarded reinstatement and back pay. *See. e.g., Cacchioli v. Hoberman,* 31 N.Y.2d 287, 291 N.E.2d 117 (1982). It is evident here that the State provided an adequate postdeprivation remedy for the alleged loss of petitioner's employment.

In sum, the Court of Appeals determined that here, where the State cannot provide a meaningful hearing before the loss occurs, the availability of an Article 78 proceeding satisfied the requisites of due process. The respondents respectfully submit that the Court of Appeals' decision in this case is in all respects consistent with the precedents established by this Court. This case presents, at best, a variation on the fact patterns already reviewed by the Court and does not merit the Court's attention.

II. PETITIONER HAS NOT DEMONSTRATED THAT A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS.

Petitioner's argument that this case is representative of an unresolved conflict among the circuits is meritless. The cases cited by the petitioner as representing a view contrary to that expressed in the Court of Appeals in this case do not involve facts or issues comparable to those presented here.

Representative of one view, according to the petitioner, is *Cohen v. City of Philadelphia,* 736 F.2d 81 (3rd Cir. 1984), a case involving the unauthorized failure of a civil service commission to follow state procedures for the conduct of post-termination hearings. Petitioner incorrectly states that the officials in *Cohen* failed to comply with municipal procedures providing for a pre-

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[1] An Article 78 proceeding is a uniform procedure for challenging or reviewing the action of government officials that supercedes in New York the common law writs of certiorari to review, mandamus and prohibition. D. Seigel, *New York Practice* §557 *et seq.* (1978).

termination hearing; the procedures in question provided solely for post-termination relief. The Court of Appeals expressly found these procedures constitutionally adequate, relying upon this Court's decision in *Arnett v. Kennedy,* 416 U.S. 134, (1974) (736 F.2d, 84 n.6), but found that errors had been made by the commission in the course of applying these procedures. It held, however, that the state procedures available to the plaintiff for review of the commission's decision afforded him all the process the constitution requires. *Cohen* is at least arguably similar to the case at hand in that there, too, the Court of Appeals extended the *Parratt v. Taylor* rationale to intentional acts of state officials. As discussed above, however, any controversy regarding the propriety of this view has now been resolved by the Court's decision in *Hudson v. Palmer, supra.*

As allegedly representing a contrary view, petitioner cites two cases, *Loudermill v. Cleveland Board of Education,* 721 F.2d 550 (6th Cir. 1983), *cert. granted,* 52 U.S.L.W. 3844 (U.S. July 21, 1984) (Nos. 83-1362, 83-6392), and *Vail v. Board of Education,* 706 F.2d 1435 (7th Cir. 1983) *aff'd by equally divided court,* 52 U.S.L.W. 4483 (U.S. April 23, 1984). In *Loudermill,* the Court of Appeals for the Sixth Circuit held that the State of Ohio's established procedure for terminating employees for cause was constitutionally inadequate in that it afforded employees only a post-termination hearing [citing, *inter alia, Arnett v. Kennedy,* 416 U.S. 134 (1974), and *Mathews v. Eldridge,* 424 U.S. 319, 333-35 (1976)]. In the second case cited by petitioner, *Vail v. Board of Education,* the court held that an implied contract for employment created a constitutionally protected property interest which could not be terminated for cause without a prior hearing. That court found *Parratt v. Taylor* inapplicable because, unlike *Parratt,* the case did not involve officials' disregard of established state policy.

Neither *Loudermill* nor *Vail* involved deprivations of property resulting from unauthorized misconduct, as allegedly occurred

in this case, and thus did not involve the issue of whether pre-deprivation process was practicable or meaningful. Inasmuch as this case is not comparable to these two cases, it is not representative of a conflict and need not be reviewed on that basis.

III. THERE IS NO INTRACIRCUIT CONFLICT.

The Court of Appeals' failure to address whether Petitioner's loss occurred pursuant to established state procedure does not demonstrate an intracircuit conflict.

In arguing to the contrary, petitioner places undue importance on a comment regarding "established state procedure" made by Judge Pierce in *Burtnieks v. City of New York,* 716 F.2d 982, 988 (2d Cir. 1983); a fair reading of that case reveals that the comment was dictum. The applicability of *Burtnieks* and the issue of established state procedure was fully briefed by petitioner to the Court of Appeals. Quite obviously, the majority of that court did not feel constrained to address these points in its decision because it found them to have no application here.[2] As discussed above, the validity of that view has been demonstrated by this Court's decision in *Hudson v. Palmer, supra.* Rather than create an intracircuit conflict, it should be plain that the Court of Appeals' failure to address the comment in *Burtnieks* served to clarify the import of a rather ambiguous statement.

This Court has no need to review this case in order to hunt for an intracircuit conflict where one plainly does not exist. For this reason, the Petition should be denied.

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[2] It is significant that Judge Van Graafeiland, who authored the Court of Appeals' decision in this case, was also on the panel that heard *Burtnieks.* Moreover, not one of the members of the Court of Appeals for the Second Circuit requested a vote on Giglio's petition for a rehearing en banc, with the exception of Judge Cardamone, who dissented from the court's original decision in this case. It would seem, therefore, that the members of the circuit do not perceive a conflict in their expressed views on this point.

IV. THIS CASE PRESENTS NO SPECIAL OR IMPORTANT ISSUES REQUIRING THIS COURT'S ATTENTION.

Petitioner contends that the decision of the court below will somehow be perceived as condoning coercive actions by State officials designed to pressure their employees to submit their resignations. The suggestion that the decision will result in an outbreak of coerced resignations is absurd.

The Court of Appeals did not hold that State officials may coerce resignation with impunity; State officials have always been subject to corrective action for their misconduct in the course of an Article 78 proceeding. The Court of Appeals simply concluded that, due to the nature of the property deprivation in this case and the official action which allegedly brought about that deprivation, the State could not have provided a meaningful hearing until after the petitioner resigned. By making a meaningful hearing available to him at the only time feasible, the court held, New York afforded the petitioner all the process the constitution requires.

Petitioner's contention that the decision permits officials to "avoid due process requirements" simply begs the question. He has not demonstrated that this case will have any significant effect upon persons other than the parties to this case or that the circumstances herein are particularly likely to re-occur. Accordingly, it does not merit review by this Court.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HARRIS, BEACH, WILCOX,
RUBIN AND LEVEY
By: Paul R. Braunsdorf
Counsel of Record
Attorneys for Respondents
Two State Street
Rochester, New York 14614
Telephone: (716) 232-4440

James A. Spitz, Jr.
Angela J. Panzarella
Of Counsel